FILE COPY

SEP 21 1
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

No. 347

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION ON APPEAL.

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel

BARNARD & MILLER PRINT, CHICAGO

(34,478)

SUBJECT INDEX.

	PAGE
STATUTORY PROVISION SUSTAINING JURISDICTION.....	1
DATE OF JUDGMENT BELOW	2
DATE OF APPLICATION FOR APPEAL	2
NATURE OF CASE AND RULING BELOW	2
(a) The question involved	3
(b) How question arises	3
(c) Questions decided below	5
PERTINENT SECTIONS OF ILLINOIS STATUTE.....	6
CASES TO SUSTAIN JURISDICTION	8
SUGGESTIONS IN SUPPORT OF JURISDICTION	10

TABLE OF CASES.

Barron v. Burnside, 121 U. S. 186, 200..... 9

Barrow Steamship Co. v. Kane, 170 U. S. 100, 110, 111 9

Bridge Proprietors v. Hoboken Co., 68 U. S. 116, 145..10, 20

Delmas v. Insurance Co., 81 U. S. 661, 668.....10, 20

Frost & Frost Trucking Co. v. Railroad Commission of California, 271 U. S. 583, 592, 599.....10, 18

Hanover Insurance Co. v. Harding, 272 U. S. 494, 507..9, 18

International Paper Co. v. Mass., 246 U. S. 135, 141.. 9

N. Y. Electric Lines Co. v. Empire City Subway Co., 235 U. S. 179, 186 .....10, 20

Pullman Company v. Kansas, 216 U. S. 56, 63..... 9

Road District v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8 .....10, 20

PAGE

State v. Guilbert, 56 Oh. St. 575, 47 N. E. 551, 558....9, 15

Southern Pacific Co. v. Denton, 146 U. S. 202, 207.... 9

Western Union Tel. Co. v. Kansas, 216 U. S. 1, 35, 36.. 9

TEXT BOOKS.

2 Cooley's Const. Lims., 8th ed., p. 1124..... 9

Niblack's Analysis of the Torrens System, Sec. 135, p. 213 11

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929

No. 347.

EDWARD ELIASON and ELIN ELIASON,
Appellants,

vs.

CHARLES WILBORN, CARRIE S. WILBORN and NOEL STATE BANK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory provision sustaining jurisdiction.

The case is one in which there is drawn in question the validity of a statute of Illinois on the ground of its being repugnant to the Fourteenth Amendment to the Constitu-

tion of the United States. The judgment of the Supreme Court of Illinois, which is the highest court of that state in which a decision in the suit could be had, sustained the validity of the statute. The case is therefore one which was subject to review in this Court on writ of error under Section 237 of the Judicial Code as amended (United States Code, Title 28, Sec. 344) under legislation in force when the Act of January 31, 1928, was passed, which substituted appeal for writ of error. (United States Code, Title 28, Secs. 861a, 861b.)

B.

Date of judgment and date of application for appeal.

The judgment sought to be reviewed was entered on June 19, 1929. (Rec., 26.)

The application for appeal was presented and allowed on August 13, 1929. (Rec., 30.)

C.

Nature of case and ruling below.

Appellants have filed with the clerk of this court, as appendices to this statement, authenticated copies of appellants' reply brief and petition for rehearing filed below, in order to show with greater certainty that the federal question raised on this appeal was timely presented. (Appendices: Reply Brief, 8, 9; Petition for Rehearing, 7, 8, 9.) We think this sufficiently appears from the opinion itself (Rec., 22), but in view of the inadvertent reference in that opinion to the *Fifth* Amendment to the Federal Constitution (Rec., 22), and to save any question, we thought best to bring to the attention of this court, in the manner indicated, the fact that appellants urged below that the statute, as construed and applied to appellants by the state

court, is in violation of the *Fourteenth* Amendment to the Federal Constitution because it deprives them of their property without due process of law.

THE QUESTION INVOLVED.

The statute of the State of Illinois here involved is "An Act concerning land titles," approved and in force May 1, 1897, as amended, commonly known as the "Torrens System" of land registration. (Laws 1897, p. 141; Cahill's Ill. Rev. Stats. 1927, Ch. 30.) The pertinent sections are hereinafter set out. (*Infra*, pp. 7-8.) The federal question presented on this appeal is whether that statute, as construed and applied in this case to appellants by the Supreme Court of that state, and which, as so construed, makes a certificate of title based on a forged deed and issued by the registrar of titles (a mere ministerial officer) without notice to the owner, conclusive evidence of title against such owner in favor of a purchaser from the grantee in the forged deed, deprives appellants of their property without due process of law and denies to them the equal protection of the laws, in violation of the Fourteenth Amendment of the federal Constitution.

HOW THE QUESTION ARISES.

Appellants, on July 30, 1926 (Rec., 1), filed their petition or bill in equity in the Circuit Court of Cook County, Illinois, to cancel two certificates of title to lands owned by them which had been issued by the registrar of titles of said county without notice to appellants and the two deeds upon which such certificates were based. The first certificate was based on a forged deed purporting to have been made by appellants to one Jerome C. Napletone, and the other upon a deed from said Napletone to appellees, the Wilborns, under which deed the Wilborns claim title.

Appellants' petition was filed in accordance with the provisions of Sections 93 and 94 of said Torrens Act and as therein authorized. Those sections expressly authorize the filing of such a petition by any person interested in registered land to obtain a cancellation of any certificate of title, memorial or other entry upon the register improperly issued or made by the registrar of titles. The proceeding authorized is in the nature of a bill to remove and cancel a cloud on title to registered land.

A demurrer was sustained to the petition and it was dismissed at appellants' costs. Judgment was entered accordingly (Rec., 13) from which appellants appealed to the Supreme Court of Illinois, which is the highest court of review in that state.

The Supreme Court of Illinois, in an opinion first handed down October 25, 1928, affirmed the judgment of the trial court. (Certified Transcript of Rec., 38-49.) Thereupon, appellants filed their petition for a rehearing, which was allowed (Rec., 16), and the case was reconsidered by that court at the June Term, 1929, at which time, June 19, 1929, the court adhered to the conclusions formerly reached by it and (one of the Justices dissenting), readopted and refiled its former opinion, written by Mr. Commissioner Partlow (Rec., 17), and rendered judgment for costs against appellants in favor of appellees. (Rec., 26.)

The title to appellants' land, as shown by the pleadings (Rec., 1) was originally registered under said Torrens Act in Edward J. Haley and wife, on August 6, 1921. By *mesne* conveyances, the title afterwards became vested in appellants, to whom a certificate of title was issued by the registrar under said act, September 21, 1923. In May, 1926, Napletone, a stranger to the title, surreptitiously obtained from appellants their certificate of title and forged appellants' signatures to a deed purporting to be from appellants to himself, which deed, accompanied by said certificate of

title, he filed with the registrar and obtained thereon a certificate of title in himself. A few days thereafter, Napletone conveyed the land to appellees, the Wilborns, who bought without actual notice of the forgery. The Wilborns then filed their deed, together with the certificate of title issued to Napletone based on the forged deed, with the registrar and obtained from him, after notice of the forgery (Rec., 14), a new certificate of title showing title in themselves, based on the deed from Napletone. It is these two last mentioned certificates and deeds which appellants sought to have canceled and removed as clouds on their title.

QUESTIONS DECIDED BELOW.

Two questions which controlled the decision in the case were presented and argued on the appeal before the Supreme Court of Illinois and each of them was considered and decided by that court:

First. Whether or not the statute, when properly construed, makes a certificate of title issued by the registrar, based on a forged deed and without notice to the owner whose signature is forged, conclusive evidence of title as against the owner in favor of a purchaser without notice.

The court below decided that it did, and so construed and applied the statute.

Second. Whether or not, as so construed, the statute violates due process of law and is repugnant to the Fourteenth Amendment to the federal Constitution.

The court below sustained the validity of the statute, as thus construed, and held that the statute did not deprive appellants of their property without due process of law, upon the following grounds:

(a) That the Act makes provision for the protection of any person wrongfully deprived of his land by giving

him recourse to the "indemnity fund" provided by the Act, or an action against the county to recover his damages (Rec., 23-24); and (b) that when one voluntarily submits his land to the operation of the Act, as in the case of an original registrant, or purchases land already under the Act, as in the case of appellants, he thereby consents, pursuant to the condition imposed by Section 46 hereinafter quoted, to be bound by *all* of its terms and provisions and cannot complain that the Act or any part thereof is invalid as violative of any right under the federal Constitution. (Rec., 22-23.)

As pointed out later, neither of these grounds can be sustained under the decisions of this court.

The constitutional validity of the statute is the only ground upon which can rest the judgment of the court below and it is the only ground on which that court based its decision.

The court below made no attempt to uphold the constitutionality of this statute except upon the grounds hereinabove noted. Unless one or both of these grounds can be sustained, we submit that the statute is clearly invalid because it deprives appellants of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution.

PERTINENT SECTIONS OF THE STATUTE.

The Illinois Act is substantially in the same form as that adopted in a number of other states, which Act, in the main, is patterned after the Torrens System of land registration in force in parts of England, Australia, Canada and New Zealand.

The provisions relevant to the question at hand are as follows:

Section 40, (R. 20) which provides that the registered owner of any estate or interest in land brought under the Act shall, except in cases of fraud to which he is a party, hold the same subject to certain charges set forth in said section, and also subject "*only* to such estate, mortgages, liens, charges and interests as may be noted in the last certificate of title in the registrar's office and *free* from all others," with certain exceptions not material here.

Section 42, as follows:

> "Except in case of fraud, and except as herein otherwise provided, no person taking a transfer of registered land, or any estate or interest therein, or of any charge upon the same, from the registered owner shall be held to inquire into the circumstances under which or the consideration for which such owner or any previous registered owner was registered, or be affected with notice, actual or constructive, of any unregistered trust, lien, claim, demand or interest; and the knowledge that an unregistered trust, lien, claim, demand or interest is in existence shall not of itself be imputed as fraud."

Section 46, as follows:

> "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof. And all dealings with land or any estate or interest therein, after the same has been brought under this act, and all liens, incumbrances and charges upon the same, subsequent to the first registration thereof, shall be deemed to be subject to the terms of this act."

Section 47, (omitting immaterial parts) as follows:

> "A registered owner of land desiring to transfer his * * * interest therein * * * may execute to the intended transferee a deed or instrument of conveyance * * *. And, upon filing *such* deed or other instrument in the registrar's office and surrendering to the registrar the duplicate certificate of title * * * he shall make out and register * * * a new certificate * * *."

Section 54, which provides that a deed of registered land

> "shall take effect only by way of contract between the parties thereto, and as authority to the registrar to register the transfer * * * *upon compliance with the terms of this Act.* On the completion of such registration, the land * * * shall become transferred * * * according to the purport and terms of the deed * * * ."

Section 58, (omitting immaterial parts) as follows:

> "In the event of a duplicate certificate of title being lost, mislaid or destroyed, the owner * * * may make affidavit * * * and the registrar, if satisfied as to the truth of such affidavit and the *bona fide* of the transaction, shall issue to the owner a certified copy of the original certificate * * * and such certified copy shall stand in the place of and have like effect as the missing duplicate certificate."

Note: The statute makes no provision for notice or hearing before the registrar in the matter of the transfer of title and the issuance of a new certificate based on such transfer.

D.

Cases believed to sustain jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

I.

ON THE QUESTION WHETHER THE COMPENSATION PROVISION IN THE STATUTE, GIVING RECOURSE TO THE "INDEMNITY FUND" OR ACTION FOR DAMAGES AGAINST THE COUNTY, IS AN ANSWER TO THE CONSTITUTIONAL OBJECTION.

Cases holding that a state cannot take the property of one citizen and give it to another, even for a full compensation, except for a public use, viz.:

2 Cooley's Constitutional Limitations, 8th Ed., p. 1124, and the numerous cases there cited.

State v. Guilbert, 56 Oh. St. 575, 47 N. E. 551, 558, which involved the precise question.

II.

ON THE QUESTION WHETHER APPELLANTS ARE BOUND BY UNCONSTITUTIONAL PROVISIONS OF THE STATUTE ON THE GROUND OF THEIR SUPPOSED CONSENT.

Cases in which this court has held that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution and laws of the United States, made or implied in obedience to a statute which imposes such consent or agreement as a condition to the exercise of a right or privilege granted by such statute, viz.:

(a) Removal cases, involving validity of state statutes requiring foreign corporations to consent to waive right under the Constitution and laws of the United States to remove cases to federal court as a condition to obtaining permit to do a local business, viz.:

Southern Pacific Co. v. Denton, 146 U. S. 202, 207.

Barron v. Burnside, 121 U. S. 186, 200.

Barrow Steamship Co. v. Kane, 170 U. S. 100, 110, 111.

(b) Tax cases, requiring foreign corporations to pay unconstitutional tax or franchise fee for privilege of doing a local business, viz.:

Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 35-36.

Pullman Company v. Kansas, 216 U. S. 56, 63.

International Paper Co. v. Mass., 246 U. S. 135, 141.

Hanover Insurance Co. v. Harding, 272 U. S. 494, 507.

(c) California case in which the state required a *private* carrier to assume the duties of a *common* carrier as the price for the privilege of using state highways, viz.:

Frost & Frost Trucking Co. v. Railroad Commission of Calif., 271 U. S. 583, 592-599.

III.

THE DECISION OF THE ILLINOIS COURT IS BASED UPON A SUPPOSED CONSENT OF APPELLANTS, SAID TO BE IMPLIED FROM THE STATUTE (SEC. 46) THAT THE CERTIFICATE OF TITLE ISSUED BY THE REGISTRAR, BASED ON A FORGED DEED, SHALL BE CONCLUSIVE IN FAVOR OF A PURCHASER. WE CONTEND THAT NO SUCH CONSENT IS TO BE FOUND IN THE STATUTE.

(a) As to the right of this court to determine whether such consent has in fact been given, we cite:

N. Y. Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 186.

Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.

(b) Such power must reside in this Court; otherwise the power of this court to prevent the infringement of the federal Constitution would be of no avail.

Delmas v. Insurance Co., 81 U. S. 661, 668.

Bridge Proprietors v. Hoboken Co., 68 U. S. 116, 145.

E.

Suggestions in support of jurisdiction.

This is the first instance under our form of constitutional government that a court of review has held that a person, through no fault or wrong of his own, may in virtue of a state statute have his property wrested from him by means of a forged deed.

The question which here arises for the first time was anticipated by Niblack in his "Analysis of the Torrens System," Sec. 135, p. 213. In there discussing the question whether under our federal Constitution a state may lawfully make a certificate of title based on a forged deed conclusive evidence of title against the rightful owner, on which question he expressed grave doubt, he said:

> "* * * but for the determination of this matter, and of many questions arising under the Torrens statutes, we must wait until the Supreme Court of the United States has rendered its decision."

The question is now before this Court, and an authoritative determination of the question is of public interest in every state where Torrens statutes are in force. It is a matter, we submit, of great public interest to know whether a state is free to insert any condition or provision it may see fit to impose in a Torrens statute, however unconstitutional it may be and however it may operate to deprive a person of his property without due process of law or to deny him the equal protection of the laws, and then say to the person aggrieved that because he has registered his land under the Act or has acquired title to land already registered, he has thereby consented that he may be so deprived of his property or be so denied the equal protection of the laws. If so, Torrens statutes may provide without limit that registered lands may be taken for public or private use without compensation or that such lands may be taxed without regard to any rule of uniformity, etc. And if this consent doctrine is applicable to a land registration statute it may be applied to all other subjects of legislation. The far-reaching effect of such a doctrine and the consequences to which it may lead are at once apparent.

The statute provides for neither notice nor hearing in the matter of transfer of title and the issuance by the registrar of a new certificate thereon. Under the construction

given the statute by the court below, a deed from the owner is not necessary—a forged deed is sufficient to authorize the registrar to act, and when he, a ministerial officer, without notice to the owner, issues a certificate of title to a supposed grantee, based on a forged deed or on a blank piece of paper or upon nothing at all, such certificate is made conclusive evidence of title against the owner in favor of a subsequent purchaser without notice.

The court below made no attempt to uphold the constitutionality of this statute except upon the grounds hereinabove noted. Unless one or both of these grounds can be sustained, we submit that the statute is clearly invalid because it deprives appellants of their property without due process of law in violation of the Fourteenth Amendment to the federal Constitution.

The opinion below states (Rec., 23) that, "The Act erected a safeguard against a forged transfer being registered, by the requirement [Section 47] that no transfer should be registered unless the owner's certificate was produced along with the instrument of transfer," and that (Rec., 23), "If section 47 had been complied with it would have been impossible for Napletone to have accomplished this fraud." Section 47 (*supra*, p. 7) also requires, in addition to the production of the duplicate certificate, that the owner's deed (*i. e.*, his own deed) be filed with the registrar as a condition precedent to his authority to make a transfer. This latter safeguard, the court holds is of no moment.

It is possible, of course, that if Napletone had not obtained from appellants their certificate of title he would not have succeeded in accomplishing this fraud, but that does not follow from any provisions or safeguards of the Act. The statute furnishes no protection to the owner against *any* unauthorized act of the registrar if it is to be

construed, as the lower court construed it, as making the certificate issued by him conclusive evidence of title in favor of a purchaser.

The statute would furnish a safeguard only in case the conclusiveness of the registrar's certificate were made dependent upon his *authorized* action under Section 47 in the two respects therein named, namely, the production of the outstanding duplicate certificate together with the owners' genuine deed, both of which are required by that section.

We have also made note above (p. 8) of Section 58 of the statute, which provides for the issuance of a certified copy of the certificate upon filing of affidavit of loss, etc., of the owner's duplicate original. Under this section, despite the utmost care and the actual possession of his certificate by the rightful owner, one intending to steal his land may forge an affidavit of loss, present it to the registrar and obtain a certified copy of the duplicate certificate which copy, under the statute, has "like effect as the missing duplicate certificate." He may then forge a deed from the owner, present it with the new certificate, have the transfer registered and, upon conveying to a purchaser ignorant of these facts, take the owner's property from him without notice and without his act, fault or knowledge. He may also accomplish the same result by forging an owner's duplicate certificate as well as the deed.

The other obvious reason why the retention by the owner of his duplicate certificate of title affords him no protection under this statute as construed by the court below is that if the registrar issues a new certificate of title to a grantee in a forged deed, or without any deed, and without the surrender or production of the outstanding duplicate certificate and without any affidavit being furnished as to its loss, a purchaser without notice from such grantee would get good title, and this in spite of the fact that the owner may have his duplicate certificate under lock and key.

If the owner is not protected against the unauthorized act of the registrar in issuing a certificate of title based on a forged deed, neither would the owner be protected against the unauthorized act of the registrar in issuing a new certificate without the production or surrender of the owner's duplicate certificate or affidavit as to its loss.

While the court below was in error in supposing that it was within the power of appellants under this statute to prevent this fraud by retaining possession of their duplicate certificate of title, nevertheless that court did not base its decision, independent of the statute, upon any equitable ground or principle of general or local law that appellants should lose their title because of any negligence or other act on their part in suffering their duplicate certificate to get out of their possession. The opinion contains no intimation that, independent of the provisions of Sections 40 and 42 (which sections as construed made the certificate issued to Napletone conclusive evidence of title in favor of appellees), the court would have decided adversely to appellants because they suffered Napletone to obtain possession of the duplicate certificate. To the contrary the opinion expressly states (Rec., 22) that the Wilborns "took a good title *unless the statute is unconstitutional.*" Therefore, the only ground on which rests the decision below is the constitutional validity of the statute as construed and applied in this case.

I.

The compensation provision is no answer to the constitutional objection.

One of the grounds on which the court below sustained the constitutional validity of the statute, viz., that the Act makes (or at least purports to make) provision for the protection of any person wrongfully deprived of his land by

giving him recourse to the "indemnity fund" or an action against the county to recover his damages, is no answer at all—for, as the taking of property by an unauthorized registration or wrongful transfer is for a private use, the provision for compensating the injured owner in no way legalizes the taking.

The state cannot take the property of one person and give it to another, *even for a full compensation,* except for a public use.

As said in the Ohio case above cited, which involved the constitutionality of a section of the Ohio Torrens Act and the effect of the provision remitting the injured party to the indemnity or assurance fund:

> "But property in all of its subjects is equally sacred under the protection of this section of the bill of rights. To permit its abrogation would equally expose all descriptions of property to spoliation. The section is an inviolable assurance to all owners of land and chattels that, unless they are required for a public use, they may retain them in specie, placing upon them any estimate that may be suggested by judgment, sentiment or caprice; and it is not within the combined authority of the departments of the government of the state to say that the estimate is too high. * * *
>
> The terms of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them, under the earlier provisions of the act, and without due process of law. When the provisions of the constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden."

The provision for compensation may protect the *purchaser* who relies on the certificate of title. In his case no constitutional rights are impaired and he has no cause to complain if he recovers his damages caused by the error or wrongful act of the registrar. But not so with the owner whose property is arbitrarily taken from him without due

process of law and given to another. Compensation by way of damages is no justification in his case. He has a constitutional right to retain his property in specie—his home, for example—and it cannot be taken from him, "even for full compensation, except for a public use."

II.

Appellants are not bound by unconstitutional provisions of the statute because of their supposed consent.

The second ground, viz., that appellants are precluded from questioning the validity of the statute because of their consent to be bound by *all* of its terms under the condition imposed by Section 46 above quoted (p. 7) and which consent is said to be implied from their having purchased lands registered under the Act, involves the right of a state indirectly to impair constitutional guaranties by compelling a person to elect either not to exercise a right or privilege at all (in this case, the right or privilege to purchase and own registered lands) or, as the price to be paid for exercising such right or privilege, to waive the protection of the Fourteenth Amendment and consent to be bound by a statute which deprives him of his property without due process or denies to him the equal protection of the laws. The holding of the lower court on this point is contrary to the principle announced by this Court in the cases above cited.

The law as announced in these cases is that no validity or effect can be given to any consent or agreement of a person to surrender a right or privilege secured to him by the Constitution and laws of the United States, made or implied in obedience to a statute which requires such consent or agreement as a condition to the exercise of a right or privilege granted by such statute.

Under these cases no effect can be given to Section 46 of the statute above quoted (p. 7), such as was given by the court below. If, as held by the lower court, that section implies a consent running with the land that every subsequent transferee agrees to be bound by *all* the provisions of the Act, notwithstanding certain of those provisions impair rights secured by the federal Constitution, appellants are not thereby precluded, under the decisions of this court, from questioning the validity of those provisions which violate the federal Constitution.

In the *removal cases,* some of which are above cited, this court held that, while a state may prohibit a foreign corporation from transacting any local business within the state and may impose such conditions as it sees fit in granting such privilege, yet, it may not, as a condition precedent to obtaining a permit to do a local business, require the corporation to surrender a right or privilege secured to it by the Constitution and laws of the United States. And in those cases it was held that no validity or effect could be given to the statute nor *"to any agreement or action of the corporation in obedience to its provisions."*

In the *tax cases, supra,* this Court applied the same principle to a statute of Kansas, which required a corporation of another state, as a condition of doing a local business in Kansas, to pay to the state certain graduated percentages of its capital stock. It was held that this requirement operated as a burden on the interstate business of the company, in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the state, in violation of the due process clause; that, thus, it was violative of the constitutional rights of the company, and that the right of the company to continue to do business in Kansas was not and could not be affected by this condition.

The same rule was applied in Hanover Ins. Co. v. Harding, *supra*, in which this court held that a state may impose, as a condition precedent to a renewal of a license of a foreign insurance company to do business in Illinois, that all valid laws of the state shall have been complied with, but that the state may not make past compliance with a tax which is violative of the federal Constitution a condition precedent to the renewal of such license.

This principle was applied in Frost & Frost Trucking Co. v. R. R. Com., *supra*, to a statute of California which required *private* carriers using the state highways to procure a certificate of public convenience and necessity and to assume the duties and burdens of a *common* carrier. This court held the statute invalid on the ground that, even assuming that the use of its highways by private carriers for hire is a privilege which the state may deny, it cannot constitutionally exact as the price for the exercise of that privilege the unconstitutional condition that a private carrier shall assume against his will the burdens and duties of a common carrier. This court answered the contention urged in that case that the act of the carrier was a voluntary one and that he was not compelled against his will to assume the burdens of a common carrier, by saying (p. 593):

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden. * * * It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which*

> ***require the relinquishment of constitutional rights.*** If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Need more be said to show the application of the foregoing principle to the instant case? These decisions fully sustain our position that appellants are not precluded from questioning the constitutional validity of the statute, as construed and applied in this case by the court below, because of the supposed "consent" involved in or implied from their act in purchasing lands registered under the Act, or because of the condition imposed by said Act (Sec. 46) that "The bringing of land under this act shall imply an agreement which shall run with the land that the same shall be subject to the terms of the act and all amendments and alterations thereof," whether violative of the federal Constitution or not.

III.

The statute implies no consent that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser.

The Supreme Court of Illinois held in deciding the case below, that, by the terms of the statute (Sec. 46) a transferee of a registered title consents that any certificate of title issued by the registrar, even though based upon a forged deed, is conclusive against the former owner and in favor of a subsequent purchaser. We have contended above that such consent if given is invalid and not binding upon these appellants.

We wish here briefly to urge that under the provisions of the Torrens Act, a transferee of a registered title does

not consent that a certificate of title based upon a forged deed shall be conclusive in favor of a purchaser, and further that the construction of the statute to the contrary by the Illinois Court is not binding upon this Court.

Where a question is raised whether a state has violated the constitutional provision prohibiting the impairment of the obligation of contracts, this court will determine for itself the existence, construction and validity of the alleged contract, even if this involves the construction of statutes. (N. Y. Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 186; Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8.) If this power did not exist in this court, then such unconstitutional provision could always be evaded by the state courts giving such construction to a contract or such decisions in respect to its validity as to render the powers of this court of no avail. (Delmas v. Insurance Co., 81 U. S. 661, 668; Bridge Proprietors v. Hoboken Co., 68 U. S. 116, 145.)

So here, where the alleged consent of appellants to an unconstitutional provision of the statute is the basis of the Illinois decision, we submit that it is competent for this court, following the rule laid down in the cases involving the impairment of the obligation of contracts (as was done in the road assessment case of Road Dist. v. St. L. S. W. Ry. Co., 257 U. S. 547, 557-8) to ascertain for itself whether under the provisions of the statute any such consent was in fact given in behalf of these appellants as transferees of the title.

In reaching its conclusions as to a transferee's consent, the Illinois court failed to notice the exception contained in Section 42 in respect to the conclusiveness of the certificate and failed to give any effect to Section 47 and 54 of the act.

Sections 47 and 54 (*ante*, pp. 7-8) prescribe the conditions under which the registrar is empowered to register transfers and to issue new certificates of title. These sections in terms make the *genuine* deed of the registered owner the only authority to the registrar to register any transfer. The registrar is a non-judicial officer vested with limited powers. They are those and only those granted by the statute. Unless a *genuine* deed of the registered owner is presented to him, the registrar is without power to act and any attempted action taken by him without such authority is contrary to the statute and a nullity. His unauthorized act, like a judgment of a court entered without jurisdiction, is wholly void. By executing a deed and presenting it to the registrar, the owner thereby enters his appearance in the matter of the transfer of title, has notice of the entire proceeding and an opportunity to protect his rights. When the registrar acts upon a forged deed, the owner has no notice (no provision for notice is contained in the act) and no opportunity to be heard. His title is taken from him without due process.

By Section 46 (*ante*, p. 7) a transferee impliedly consents that his land "shall be subject to the terms of the act,"—that is, subject to *all* valid terms of the act construed together.

By Section 42 (*ante*, p. 7) a certificate of title is made conclusive in favor of a purchaser "except in case of fraud and except as herein otherwise provided." It is "otherwise provided" in the act (Sections 47 and 54) that the registrar may only make a valid transfer of title and issue a new certificate to the transferee when a *genuine* deed of the owner is presented to the registrar. It is to a transfer of title based upon a *genuine* deed and to a certificate of title evidencing *such* transfer that the owner by Section 46 consents and he does not consent that he may be deprived of his property by the autocratic action of the registrar based

upon a *forged* deed, without notice to the owner and without an opportunity to be heard.

It is a high ideal to establish a system of evidencing land titles which *at the time of acquiring title* shall protect a purchaser in expending his money. But it is a much higher ideal that such system shall protect an owner in the enjoyment of his property, *after it has been acquired.* It was to attain *this* ideal that the Fourteenth Amendment was added to the Constitution of the United States. If a person is to be deprived of his property without notice and without process by the operation of a statute on the ground that he has thereby consented to waive this constitutional protection, the provisions of the statute expressing such consent should be clear and easily understood. Such an abhorrent result should not be reached by reading such consent into a statute of doubtful meaning.

We therefore submit that appellants did not by the terms of the act agree that a certificate of title issued by the registrar based upon a forged deed should be conclusive in favor of the Wilborns and destroy the title of appellants. We further submit that it is competent for this court to determine for itself whether such consent was in fact given.

It is respectfully submitted that the federal question involved is a substantial one and that this court has jurisdiction of this appeal.

Respectfully submitted,

MATTHIAS CONCANNON,
Counsel for Appellants.

FRANKLIN E. VAUGHAN,
Of Counsel.